the decree of the circuit court will be reversed, and the cause remanded, with directions that a jury be impaneled to try and determine at the bar of the court the issue of fact involved, viz., whether or not the signature of James M. Shoemaker to the disputed bond is genuine; and upon the trial of that issue before the jury, the burden of proving the genuineness of the signature in question shall be upon the appellant.

Reversed.

MOON *et al. v.* CHILDREN'S HOME SOCIETY OF VIRGINIA.

Nov. 16, 1911.

[72 S. E. 707.]

Infants (§ 13*)—Custody—Guardianship—"Colored Person."—Acts 1901-02, c. 137, § 29, provides that when any minor child under 14, by reason of neglect, crime, or other vice of the parents, is growing up without education or salutary control, and in circumstances exposing it to a vicious life, the child may be committed to the care of the Children's Home Society. Held, that where minor daughters of a mother of gentle birth were not neglected, but were comfortably cared and provided for by their mother, and their stepfather, and it did not appear that from neglect or any vice of the mother or her husband the children were growing up without education or salutary control, and in circumstances exposing them to a vicious life, the mere fact that their mother married for her second husband one who had less than one-fourth negro blood in his veins, and was therefore not a "colored person," within Code 1904, §§ 2252, 2253, 3783, 3788, defining a colored person as one having one-fourth or more colored blood in his veins, and prohibiting such a person from intermarrying with a white woman, was insufficient to justify the commitment of the children to the custody of the society.

[Ed. Note.—For other cases, see Infants, Dec. Dig. § 13.*

For other definitions, see Words and Phrases, vol. 2, pp. 1274, 1275.]

Error to Circuit Court, Albemarle County.

Madeline Grasty and Ruby Grasty, minor children of Lucy Moon, having been committed to the Children's Home Society of Virginia, she brings error. Reversed and rendered.

Geo. E. Walker, for the plaintiff in error.

S. S. P. Patteson, for the defendant in error

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

BUCHANNAN, J. Madeline Grasty, aged 12 years, and Ruby Grasty, aged 10 years, were taken from the custody of their mother, Lucy Moon, one of the plaintiffs in error, and committed to the care, custody, and control of the Children's Home Society of Virginia, the defendant in error, by an order of the circuit court for Albemarle county, affirming the action of a justice of the peace in and for said county in a proceeding instituted under an act approved March 10, 1902, amending and re-enacting an act incorporating the defendant in error. Acts of Assembly 1901-02, c. 137, pp. 125-127.

Section 9 of that act is as follows: "Whenever any child under the age of fourteen years, by reason of orphanage or of neglect, crime, drunkenness, or other vice of the parents or other persons having custody of such child, is growing up without education or salutary control, and in circumstances exposing such child to a dissolute and vicious life, or is an inmate of any public poorhouse or almshouse in this state, any officer, agent, or member of said society may make complaint thereof to any justice of the peace or police justice, and it shall be the duty of such justice of the peace or police justice to issue his process, commanding that said child be brought before him as soon as practicable. The person having custody of such child shall also be summoned to appear at the time and place of hearing said complaint, and any witnesses he or she may desire shall also be summoned and heard in his or her behalf. If, upon such hearing, it appear that the complaint is well founded, and that the interests of such child demand that it should be relieved from such vicious or unsalutary surroundings, or should be removed from such poorhouse or almshouse, such child shall by order in writing be committed by such justice of the peace or police justice to such society until he or she attain the age of twenty-one years."

The question involved in the case is whether or not, upon the facts before the court, the act authorized it to deprive the mother of the custody of her children.

The evidence as certified by the court and the reason upon which it based its action are as follows:

"Be it remembered that on the trial of this cause the following facts were proven:

"That Lucy Moon, whose maiden name was Lucy May, and who was a granddaughter of George Christopher Gilmer, one of the most prominent citizens of this county, was prior to her marriage to John Moon the widow of one I. B. Grasty, by whom she had two children, the infant defendants, Madeline, being now 12 years of age, and Ruby, 10 years of age; that Mr. Grasty, the former husband of Lucy Moon, died leaving her in destitute cir-

cumstances; that she, with her two infant children, was offered a home with her brother, Lee May, who married one Bessie Moon, the sister of her present husband, John Moon; that she continued to live with her brother, and was given no assistance from her parents or husband's people; that, although both she and her husband were residents of this county, they went to Washington, D. C., and were married; that since her marriage to her present husband, John Moon, he has comfortably provided for her and her two children by her former husband; that these two infant defendants are not neglected as far as physical comforts are concerned, and no drunkenness or vice of their adults was proven. It was proven, however, that John Moon has negro blood in his veins; that his mother, Margaret Moon, of whom he is the illegitimate son, has according to her statement one-eighth of colored blood in her veins. The said Margaret Moon appearing upon the witness stand, it was plainly apparent to the court and to counsel and to spectators that she would pass anywhere as a mulatto woman. John Moon, Sr., the father of John, who married Lucy Moon, had a large family of children by the said Margaret, and left each of them a tract of land upon which they now reside; but on account of having colored blood they are recognized as colored people in the county, one of his children having married a colored man at Scottsville, Wash Lewis, though some of the others had intermarried with white people, all of the marriages, however, taking place out of this state, and white citizens visited their homes and took meals with them, but this was not a general custom.

"It was proven further that Madeline and Ruby Grasty were properly clothed and physically well taken care of; that they had been sent to a public school, but after their mother's marriage with John Moon they left the public school; that since her marriage with the said John Moon the mother applied for the admission of the children at the Miller Manual Labor School in Albemarle county, and in the statement filed with the application for their admission into the school, which is a part of the defense in this case and will be filed with the record, she stated that these children were the children of her husband, the said I. B. Grasty; that after the children had been at school some time she made repeated efforts to get them away from the school, and on being refused finally made an application for their withdrawal in writing, in which she certified that they were not the children of Grasty, but the children of the said John Moon, although they had been born, one during the lifetime of Grasty, and one but a short time after his death; that the children were thereupon surrendered to her by the school—children with colored blood in their veins not being allowed to enter the school and even with the suspicion of such blood their condition would be unendurable

at the school; that these two infant children had not been cruelly treated and were controlled and looked after; that there were no dissolute characters permitted at the house of John Moon, nor was there any drinking or improper conduct there; that the said John Moon was not a man of means, but had a farm and comfortable home, and was able and willing to care for the two infant defendants; that the said children had never attended the public school since their return from the Miller school, but were taught by their mother or some of the Moon connection.

"It was also proven that the said Moons, because of their color, did not associate on terms of equality with the people in their neighborhood, but formed a coterie to themselves and had few associates outside; that several of the Moon children had married white people out of the state, but that they all then returned to go upon the farms which had been given them by John Moon, the elder, who was a white man.

"It was also proven that the said Lucy Moon alleged that the children were badly treated at the Miller school and that their persons were neglected; but it was proven by the superintendent of the school that the children were carefully looked after, that there was a resident physician at the school, and that both their physical and moral well-being were cared for.

"After the above facts were proven, the court entered an order giving the custody of the infant defendants to the Children's Home Society of Virginia, stating that it did so because their mother had married a person with colored blood, who was only recognized as a colored man and that the associations of these children, who were of pure blood and gentle ancestors would be with persons of mixed blood, and that they would be deterred from association with gentle people of white blood."

It is clear from the facts certified that the act of the General Assembly furnished no authority for the action of the court in depriving the mother of the custody and control of her children. The children were not neglected, but were comfortably cared and provided for by their mother and their step-father. It does not appear that either from neglect or crime, or drunkenness, or other vice of the mother or her husband, the children were growing up without education or salutary control and in circumstances exposing them to a dissolute and vicious life. On the contrary, it appears that dissolute persons were not permitted at their home, and neither drinking nor improper conduct were allowed there. It further appears that, while the children had not gone to the public schools since their return from the Miller school, they were taught by their mother or some of the Moon connection.

The act of assembly furnishes no authority for depriving a mother of the care and custody of her children merely because

she has married into a family lower in the social scale than that in which she was reared, even though her husband has negro blood in his veins, unless he has one-fourth or more of such blood and is therefore a "colored person," within the meaning of section 49 of the Code, and prohibited under our laws from intermarrying with a white woman. Code, §§ 2252, 2253, 3783, 3788. It is not pretended in this case that the stepfather was a colored person within the meaning of our statute, or that he and the mother of the children were guilty of any crime in intermarrying, or were not persons of good character.

The mother, the father of the children being dead, however, poor and humble she may be, being of good moral character and able alone, or with the assistance of their stepfather (also of good moral character), to properly support and care for her children, and who is so supporting and caring for them, cannot be deprived of that privilege by the defendant in error under the provisions of its charter.

We are of opinion, therefore, to reverse the order of the circuit court, and enter such order as it ought to have entered, dismissing the proceeding commenced before the justice of the peace, and restoring the said children to the custody of their mother, the plaintiff in error.

Reversed.

Note.

This interesting and important case deserves close and careful consideration. We can appreciate the difficulty with which the court of appeals found itself confronted in the decision of this case in the fact that the legislature has attempted to establish a dividing line between white and colored persons which does not coincide with that established by the universal consensus of the public opinion of the state, so that, under the law as laid down by the legislature, there is a considerable class of citizens who are in the eye of the law white, but by the judgment of society are colored. Thus courts are drawn two ways, in one direction by their duty to follow the law laid down in the statute books, and in the other by their desire, nay almost their duty, to respect, certainly to give due consideration to, the actual facts and conditions of the case.

This difficulty will continue to exist until the legislature adopts the rule enforced by public sentiment and recognizes and declares to be members of the colored race all having an appreciable amount of negro blood. They have taken a step in this direction, but only a step, by limiting this class of the legally white colored persons to those having less than one-sixteenth of negro blood. (See acts of Assembly, 1909-10, p. 581, amending sec. 49 of the Code.)

We must assume that the court would have been glad to see its way, consistently with its conception of the law, to take these children from the custody of their mother and from the association with persons having more or less negro blood in which it found them, and place them in the surroundings and under the social conditions under which, by virtue of their white birth, they were by the universal consensus of public opinion, entitled to be reared. So

that it must have rendered the decision it did from what it considered to be the necessity of the case. We hope that we shall not be considered presumptuous if we respectfully differ with the court in this view, and show as well as we can the reasons upon which we base this opinion.

Discretion of Court with Reference to Child's Best Interests.—It is hardly necessary to do more than cite a few cases to the general proposition that, in determining the right to the custody of a minor child, the court, whether it be a court of common law or one of equity jurisdiction, has a discretion upon the subject, and that the interest of the child is the chief consideration to be looked to. See Merritt *v.* Swimley, 82 Va. 433, 437. See, also, Slater *v.* Slater, 90 Va. 845, 847, 20 S. E. 780, where it is said: "'Rights of the father to the custody of his children are not so absolute in this country as in England. Where each is blameless, the father is entitled to the custody of his children. But the courts adopt the equitable principle that this right must yield to considerations affecting the welfare of the children. * * * The later and better doctrine now generally recognized with respect to contentions among relatives for the custody of infants, is that the future welfare and interest of the child is the paramount consideration, even as against the claim of either or both of its parents; and notwithstanding a statute recognizing the superior rights of the father.'" See, also, Taylor *v.* Taylor, 103 Va. 750, 758, 50 S. E. 273, where it is said: "The welfare of the child being the paramount object to be secured, attention to many circumstances is required, such as its sex, age, health and **social position** as affected by its parents; its expectations of property from them or either of them; the state of its morals and education; and the surest means, under the circumstances, of securing for it that discipline and instruction necessary to qualify it for that station in life it would reasonably have been expected to fill had no controversy arisen. The comparative qualifications, also, of the parents to provide for these various wants require consideration, such as temper, morals, habits, judgments, etc."

In Green *v.* Campbell, 35 West Va. 699, the court said: "The father is the **natural guardian** of his infant child, and, in the absence of good and sufficient cause shown, is entitled to its custody. But the court is in no case bound to deliver the child into the custody of any claimant, but may leave it in such custody as the welfare of the child may appear to require." Quoted in Stringfellow *v.* Somerville, 95 Va. 701, 706, 29 S. E. 685.

Not only the immediate safety but the future welfare of the child, should be considered in determining the question of custody. People *v.* Mercein, 8 Paige (N. Y.), 47.

"The welfare of the child is the object to be secured, and that requires attention to many circumstances; such as its sex, age, health and social position as affected by that of its parents." Garner *v.* Gordon, 41 Ind. 92, 106. See also, Clark *v.* Bayer, 32 O. St. 305." In re Luck, 7 N. P. 49, 10 O. Dec. 2, 3; State *v.* Paine, 4 Humph. 529.

Where a father seeks the delivery of his infant child to him in a controversy for its custody, the order of the court should be made with a single reference to the best interests of the child. Sturtevant *v.* State, 15 Neb. 463; U. S. *v.* Green, 3 Mason, 482. The primary object is to secure the welfare of the child, and to make that welfare paramount to the claim of either parent. Note to Sheers *v.* Stein, 5 L. R. A. 781, citing Jones *v.* Darnall, 1 West Rep. 234, 103 Ind. 574; Gishwiler *v.* Dodez, 4 O. St. 615; Dailey *v.* Dailey, Wright

(Ohio) 514; Corrie *v.* Corrie, 42 Mich. 509; Church, Habeas Corpus, § 442; Schouler, Dom. Rel. § 348; Hurd, Habeas Corpus, 461.

As it is stated in 29 Cyc., p. 1586: The parents have the natural right to the custody and control of their children (many cases cited), and in the case of the death of the one parent the surviving parent has the prima facie right to the custody of the children (many cases cited). The parents' right to the custody of the child is, however, not absolute (cases cited); but is subject to judicial control when the safety or interest of the child demands it (cases cited), and must yield where the real and permanent interest of the child demands a different disposition (many cases cited). The rights of the parents are, however, entitled to great consideration and the courts should not deprive them of the custody of their children without good cause (cases cited). And again at p. 1594: it is well established as a general rule that the welfare and best interests of the child are the controlling elements in the determination of all disputes as to the custody (citing a great many cases). But nevertheless the court should always give the custody to the person having the legal right thereto, unless the circumstances of the case justify it, acting for the welfare of the child, in decreeing the custody elsewhere (Miller *v.* Wallace, 76 Ga. 479, 2 Am. St. Rep. 48; In re Nofsinger, 25 Mo. App. 116; People *v.* Mercein, 8 Paige (N. Y.), 47, and cannot interfere with the rights of a parent unless he so conducts himself as to render it essential to the safety and welfare of the child in some serious and important respect either, physically, intellectually, or morally, that it should be removed from his custody (In re Hatfield, 1 Truem. Eq. Rep. (New Brunsw.) 142; Curtis *v.* ————, 5 Jur. N. S. 1147, 28 L. J. Ch. 458, 7 Wkly. Rep. 474).

The Exercise of Discretion Should Not Be Disturbed on Appeal unless Abused.—The custody of the child rests in the discretion of the court (citing cases); and the exercise of this discretion will not be disturbed on appeal, except in case of its manifest abuse. Washaw *v.* Gimble, 50 Ark. 351, 7 S. W. 389; Beall *v.* Bibb, 19 App. Cas. (D. C.) 311; 29 Cyc., p. 1604.

How Jurisdiction Invoked and Case at Bar.—Thus the right and duty of a court to provide for such custody of a minor child as shall be for its best interest, and to disregard in doing so, if necessary, the legal rights of its parents, is well settled. Therefore the only questions in this case would seem to be: first, whether there was such a case before the court as to invoke its jurisdiction as guardian of all infants; and secondly whether, if there was such a case before it, the best interests of the children require their custody to be taken from their mother.

Upon the first point it is said in 29 Cyc., p. 1602 that, while the jurisdiction of the courts in matters relating to the custody of children is often provided for and regulated by statute (citing cases), a court of chancery has, independent of statute, jurisdiction over the custody of minor children, to be exercised for their benefit, welfare, and protection (Bryan *v.* Bryan, 34 Ala. 516; State *v.* Grisby, 38 Ark. 406; Rossell *v.* Rossell, 64 N. J. Eq. 21, 53 Atl. 821; Buckley *v.* Perrine, 54 N. J. Eq. 285, 34 Atl. 1054, reversed on other grounds in 55 N. J. Eq. 514, 36 Atl. 1088; Baird *v.* Baird, 21 N. J. Eq. 384; Ex parte Warner, 4 Bro. Ch. 101, 29 Eng. Reprint 799), and such jurisdiction is not taken away by a statute conferring like power on another court. (The case in Bro. Ch. was upon a petition by four infant children asking that it be referred to a master to approve a proper person to have the care of their persons and education, and that their father be restrained from interfering with them.)

In a New York case, In re Lundergan, 8 N. Y. Suppl. 924, it was said that the special term of the supreme court, as successor to the powers of the court of chancery, has power to dispose of the custody of an infant brought before it on habeas corpus, although neither claimant has any legal right to such custody.

Even at the risk of prolixity we would like to quote the following from the New Jersey Court of chancery:

In Buckley *v.* Perrine, 54 N. J. Eq. 285, 34 Atl. 1054, 1057 (a habeas corpus proceeding in chancery under the New Jersey Statute), it was said: "In People *v.* Mercein, 8 Paige, 55, Chancellor Walworth, upon the subject of such assumption, said: 'A writ of habeas corpus ad subjiciendum, however, is not, either by the common law or under the provisions of the Revised Statutes, the proper mode of instituting a proceeding to try the legal right of a party to the guardianship of an infant. This court, therefore, upon such a writ, will exercise its discretion in disposing of the custody of the infant upon the same principles which regulate the exercise of a similar discretion by other courts and officers who are authorized to allow the writ in similar cases.' In Baird *v.* Baird, Chief Justice Beasley states the practice in this way: 'If the simple purpose was to free from illegal restraint, the proceeding was either in the law courts, or in chancery, by the instrumentality of the habeas corpus; and, in such proceeding, a court of equity had no power to make any order which was not within the competency of a law judge But, on the other hand, when the object was to fix the status of a minor with regard to permanent custody or guardianship, and to settle, for any course of time, the rights of contending parties to such custody, then the application was to the chancellor, by virtue of his general superintendency over the concerns of infants. The proceeding then was by petition to him as parens patriae. This distinction between the chancellor's jurisdiction over infants by habeas corpus and as wards of the court is clearly marked in the practice, and has been often noted by the court.' It was held in that case that the pleadings, proofs, and decree evinced that the court of chancery acted under its general superintendency over the affairs of infants, as distinguishable from its more limited jurisdiction in proceedings by habeas corpus. Again, in English *v.* English 32 N. J. Eq. 738, the proceeding in chancery was by petition for a writ of habeas corpus, which alleged facts to invoke the exercise of the court's jurisdiction over the welfare of infants, and the return put that matter in issue. Mr. Justice Knapp, in writing the opinion of the court of errors and appeals, said: 'The jurisdiction of the court of chancery to settle and dispose of the care and custody of infants, through proceedings like this, is established. The parties, in their litigation, have, by their pleadings and proofs, presented issues within the cognizance of that court, under its general jurisdiction as public guardian of the rights and interests of infants. Such jurisdiction is not, by the use of the writ of habeas corpus to bring the infants into court, cut down and restricted to those limits which outline and bound a strict proceeding on habeas corpus. The writ serves a purpose merely ancillary to the more general design of the suit,—to secure a definite disposition of them as wards of the court. Baird *v.* Baird, 19 N. J. Eq. 482.' And again, in the same court, in Richards *v.* Collins, 45 N. J. Eq. 283, 17 Atl. 831, where a writ of habeas corpus was used in chancery upon petition to the chancellor for disposition of the custody of an infant, the same judge said: 'The court may stop with the mere removal of restraint, or, in its discretion, may go further, and determine for the time being the custody

of the subject of the writ. But the court of chancery exercises a far more extended control in respect to the right of custody of children in virtue of an inherent jurisdiction over that subject. In the exercise of this higher authority, that court may permanently fix the status of infants, even in disregard of the legal rights of parents, where the welfare of the infants require it. **Nor is it material to the exercise of this power in what way the subject is brought into court.** In Baird *v.* Baird the petition was to the chancellor as one of the judicial officers authorized by statute to issue the writ, and not to him in the exercise of the more general jurisdiction of the court of chancery. But the return to the writ and the answer to the return filed by the petitioner presented a case for the cognizance of the court in its more general jurisdiction. The chancellor doubted whether, in the proceeding, the general powers of the court of equity were invoked; yet, on appeal, the court of errors declared that, when an issue is made by the pleadings and proof on the question of the right to the permanent custody of infants, the case addresses itself to the general authority of equity, as the public guardian of infants. It becomes necessary in this case to determine in which of these aspects it stands before the court. In my opinion, the pleadings present a controversy such as addressed itself to the general equitable powers of the court.'"

This is an excellent statement of chancery jurisdiction over infants, and we know of nothing in the Virginia statutes or decisions that would prevent these principles from being a statement of the jurisdiction exercisable by our courts of equity. The fact that the case was inaugurated by a proceeding under the statute before a justice, would not seem to prevent the circuit court from sitting in this case as a court of equity, the justice being bound to decide the case before him according to the principles of law and equity.

As said in Buckley *v.* Perrine, 54 N. J. Eq. 285, 34 Atl. 1054, 1057: thus it is made clear that the chancery jurisdiction over the welfare and consequent custody of infants is entirely independent of its limited jurisdiction by habeas corpus, and that the former jurisdiction is invoked by pleadings presenting facts which demand its exercise, and that, when the writ of habeas corpus is used in connection with its exercise, it renders only an ancillary service. Again: "Where the chancellor's jurisdiction is invoked by habeas corpus, but the pleadings and proofs presented make an issue as to the right to the permanent custody of infants, the matter is before the chancellor under his general power to superintend the affairs of infants, and to provide who shall permanently have the custody of them during minority." Rossell *v.* Rossell, 64 N. J. Eq. (19 Dish.) 21, 53 Atl. 821, 822, citing Baird *v.* Baird, 19 N. J. Eq. 481; Buckley *v.* Perrine, 54 N. J. Eq. 285, 34 Atl. 1054; Id., 55 N. J. Eq. 515, 36 Atl. 1088.

"But the question remains whether the undoubted jurisdiction of the court is properly invoked by the bill filed in this cause. In early English cases it was made a question whether the judgment of the lord chancellor could properly be exercised upon a petition or should be invoked by bill. Ex parte Hopkins, 3 P. Wms. 152; Eyre *v.* Countess of Shaftsbury, 2 P. Wms. 103. Mr. Pomeroy asserts that the acquisition of jurisdiction depends on the infant's being made a ward of the court, and that such status arises from the infant's being brought before the court as a party in some suit or proceeding. Pom. Eq. fur. § 1305." Rossell *v.* Rossell, 64 N. J. Eq. (19 Dish.) 21, 53 Atl. 821, 822.

Remarriage of Mother.—It has been held that the natural right of a surviving mother to the custody of the child is wholly lost or

disappears where she has by a second marriage surrendered the legal discretion which is necessary to render the parental control of benefit to the child. Girls Industrial Home *v.* Fritchey, 10 Mo. App. 344; State *v.* Scott, 30 N. H. 274; Spears *v.* Snell, 74 N. C. 210. See also Worcester *v.* Marchant, 14 Pick. (Mass.) 510; Com. *v.* Hamilton, 6 Mass. 273. But in a few cases in other states this has been expressly denied (Beall *v.* Bibb, 19 App. Cas. (D. C.) 311; Armstrong *v.* Stone, 9 Gratt. (Va.) 102), and in addition many cases are to be found where a mother who has remarried has been held to be the proper custodian of her children by a former marriage (Striplin *v.* Ware, 36 Ala. 87; Ashby *v.* Page, 106 N. C. 328, 11 S. E. 283; Casanover *v.* Massengale (Tex. Civ. App. 1899) 54 S. W. 317. 29 Cyc. 1587.

Section 2603 of Va. Code, 1904 (in Ch. 116, on Guardians and Wards), provides: "But the father of the minor, if living, and, in the case of his death, the mother, **while she remains unmarried,** shall, if fit for the trust, be entitled to the custody of the person of the minor, and to the care of his education," etc., relating to the guardian.

However, when Armstrong *v.* Stone, 50 Va. (9 Gratt.) 102, was decided, this provision was in force, in the Code of 1849, where this section is first found and the court there said that the mother's right was not lost by her subsequent marriage, "there being no legal guardian to the child."

But the circuit court, whether sitting as a court of law or chancery has the clear right to appoint a guardian (Durrett *v.* Davis, 24 Gratt. 302), and it would certainly seem that in such a case as this it was its right and its duty to appoint a guardian for those children, their mother having remarried under such conditions, and then by the very terms of the statute, such guardian would have the custody of the children in preference to the mother. Thus the difficulty would have been overcome or avoided, and it seems that the court of appeals, if it did not consider it proper to appoint such guardian of its own motion, should have remanded the case to the Circuit Court of Albemarle for it to do so. This guardian could have placed the custody of the children with the Children's Home Society or other proper and fit custodian.

Best Interests of Children in This Case.—In conclusion, it would hardly seem a question as to what were the best interests of these children. It has been held that the relative social position of all the parties before the court are circumstances to be considered. Thus: "The court will not regard the parental right as controlling, when to do so would imperil the personal safety, morals, health or happiness of the child. In determining this delicate and often difficult judgment, the court looks at the character, condition, habits and other surroundings of claimants." Richards *v.* Collins, 45 N. J. Eq. 283, 287, 17 Atl. 831.

"It was proper for the court to enquire what was apparently for the best interests and general welfare of the child, having reference to the relative social positions of all the parties before the court, and to all the circumstances by which the child was surrounded. This enquiry was one to which the court might have given a wide range, and the extent of the enquiry, together with the proper inferences to be drawn from it, rested very much in the discretion of the court." McKenzie *v.* The State, 80 Ind. 547, 550. See also Garner *v.* Gordon, 41 Ind. 92, 106.

At least one Virginia case and a late one, Taylor *v.* Taylor, 103 Va. 750, 50 S. E. 273, declares that the social position of the child,

as affected by its parents, is a circumstance to be considered in determining the right to its custody.

Considerations Seemingly Not Given Due Weight.—It seems also, that even from the view point taken by the court of appeals here, that two important considerations were either overlooked or not given due weight. The first was that this mother had deliberately misstated in writing the parentage of these children to regain possession of them, and had not hesitated to cast calumny upon them, herself and upon her deceased husband by impugning their legitimacy. And it has been held that the reputation of the mother for truth, veracity and honesty is material upon her right to the custody of such children. Thus, in Ward *v.* Ward, 34 Tex. Civ. App. 104, 77 S. W. 829, it was held that, in a contest between a paternal grandfather and a mother for the custody of an infant, it is error to exclude the issue as to the mother's reputation for chastity, truth, veracity, and honesty.

And where, in a suit by an alleged father for the custody of a minor child, he is confronted by his previous allegations in a divorce suit, that the child was an adulterous bastard, and his allegations that the physical and moral welfare of the child is seriously endangered by the neglect or immoral habits of the mother are not sustained by the evidence, the court properly dismissed the action, under Acts 1894, p. 91, No. 79, empowering judges to remove children from the custody of the parents under certain circumstances. State ex rel. Curtis *v.* Thompson, 41 So. 367, 117 La. 102.

The second consideration is that, while the court here discusses the case on the theory that the Moon connection into which she had married the second time were legally white people, having less than one-fourth negro blood, and in part at least bases its decision upon the fact that there was "no authority for depriving a mother of the care and custody of her child merely because she has married into a family lower in the social scale than that in which she was reared even though her husband has negro blood in his veins, unless he has **one-fourth or more of such blood and is therefore a colored person** within the general meaning of § 49 of the Code and prohibited under our laws from intermarrying with a white woman. Code §§ 2252, 2253, 3783, 3788. It is not pretended in this case that the stepfather was a colored person within the meaning of our statute," etc., yet the legislature **had changed this law since June 15, 1910** and since that date these persons, if they have **one-sixteenth or more of negro blood are to be deemed colored persons.** Thus the court of appeals, has, by its decision, in view of this change in the law restored these children to the control of their mother, whose husband, although legally white when she married him is now a negro under the law, and these children are thus condemned for the future to associate with persons who are in the eyes of the law negroes.

Although the power of the legislature to make this legislation retroactive so as to affect the validity of a marriage such as that of the defendant to Moon may well be doubted, it can hardly be doubted that, with reference to how these people are to be regarded now and in future, whether as legally white or as negroes, it is valid and effectual legislation, and changed the status of these Moons since June 15, 1910 from white to colored, and that in determining the future associations of these children these Moons and the second husband of Lucy Moon are to be regarded as negroes or colored persons under the law. It would **seem** that the court did not take cognizance of this most important change in the law. If so, counsel should certainly have called its attention thereto.

Apparent Distinction Drawn between Cases Where Person Entitled Prima Facie to Custody Is Plaintiff and Where He or She Is Defendant.—From an examination of the Virginia cases it would seem that a distinction has been made as to the exercise of discretionary power by the court in awarding the custody of infants, between cases in which the person entitled prima facie to the custody of the infant has lost or relinquished it and is before the court seeking to recover it, and cases in which the person entitled has the custody of the infant and it is sought to deprive him of it. In the first class of cases it is well settled that the court will exercise its discretion according to the facts as to what will be best calculated to promote the welfare of the infant in awarding its custody. In the latter class of cases, however, it would seem that the inference from the decisions is that the court's discretion is limited and that the remedy, where there is abuse of custody, must be administered in another form. In Armstrong *v.* Stone & Wife, 9 Gratt. 102, the court said: "Where a person entitled has the custody and abuses it, the power of the court is limited, and the remedy for the abuse must be administered in another form. But where he has not the custody and is seeking to be restored to it, the court will exercise its discretion according to the facts."

And in Coffee *v.* Black, 82 Va. 567: "When a person entitled, but not having custody of infant, is claiming to recover it, the court will exercise its discretion according to the facts, consulting infant's wishes, if of years of discretion; and if not, exercising its own judgment as to what will be best calculated to promote the infant's welfare, having due regard to the legal rights of the claimant." See, also, Merritt *v.* Swimley, 82 Va. 433, 437.

In Stringfellow *v.* Summerville, 95 Va. 701 and in Meyer *v.* Meyer, 100 Va. 228, the court follows closely the opinion in Coffee *v.* Black, supra. While it is true that the court does not say in positive terms (except maybe in Armstrong *v.* Stone & Wife, supra) that in cases where the person entitled has the custody of the infant the court cannot exercise its discretionary power, it would seem that such was the natural inference. In this case, however, the court does not seem to have considered this question, but to have decided the case solely upon the rights of the Society under the act of the Legislature incorporating it and defining its powers.

JAMES F. MINOR AND MINOR BRONAUGH.

SILLING *v.* TODD.

Nov. 16, 1911.

[72 S. E. 682.]

1. Trusts (§ 81*)—Resulting Trusts—Payment of Consideration for Conveyance to Another—Husband and Wife.—Where property is bought and paid for by a married woman with her own means and for her own benefit, a conveyance to her husband creates a

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.